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NO. 87-1469

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

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SUPREME COURT, U.S.

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.,

PETITIONERS,

VS.

DAVID STINSON,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, David Stinson, hereby moves the Court to allow him to proceed in forma pauperis. His affidavit in support of this motion is attached as Exhibit A.

Submitted by,

Kenneth Shinbaum
McPhillips, DeBardelaben,
and Hawthorne
516 S. Perry Street
P.O. Box 64
Montgomery, Alabama 36101
(205)262-1911

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter. I caused to be delivered a true and correct copy of same, United States postage prepaid, and correctly addressed to Don Siegelman, Attorney General, and Robert L. Rash, Assistant Attorney General of the State of Alabama.

Done this the 31st day of May, 1988.

ATTORNEY FOR RESPONDENT

Exhibit A

NO. 87-1469

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.

PETITIONERS,

VS.

DAVID STINSON

RESPONDENT.

AFFIDAVIT OF ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, David Stinson, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees or costs therefor, I state that because of my financial condition I am unable to pay the costs of said proceeding.

I further swear that the responses which I have made to the questions and instructions below, relating to my ability to pay the cost of prosecuting the appeal, are true.

1. Are you presently employed? yes

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. Jackson National Insurance Company, P.O. Box 8873, Metairie, La. 70011-9990. Average $800.00 per month.

B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest,

dividends, or other source? Yes

A. If the answer is yes, described each source of income, and state the amount received from each during the past twelve months. Approximately $7,500 from preparing tax returns. On rental property, I had a loss. Approximately $30.00 in interest.

3. Do you own any cash, checking or savings accounts?

A. If the answer is yes, state the total value of the items owned. Yes. I have approximately $50.00 in a checking account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

A. If the answer is yes, describe the property and state its approximate value. I jointly own a home in which we might have $3,000 equity. I own a rental house in which I might have $5,000 equity. I jointly own a 1982 Toyota Cressida and a 1983 Toyota Celica, which we have approximately $2,000 equity.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Yvonnne Stinson, wife
Tania Stinson, daughter
Darryl Stinson, son
Brian Stinson, son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

David Stinson

SUBSCRIBED AND SWORN TO before me this 30th day of May, 1987.

NOTARY PUBLIC

My Commission expires 1-15-92

NO. 87-849

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.,

PETITIONERS,

V.

DAVID STINSON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Kenneth Shinbaum
McPhillips, DeBardelaben,
and Hawthorne
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P.O. Box 64
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(205)262-1911

COUNSEL FOR RESPONDENT

NO. 87-1469

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.,

PETITIONERS,

V.

DAVID STINSON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, David Stinson, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 821 F. 2d. 1537.

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QUESTION PRESENTED

1. Should this Court grant certiorari when this Court's opinion, Chappell v. Wallace, 462 U.S. 296, is not in conflict with the Opinion of the Eleventh Circuit Court of Appeals in this case and where, under the analysis required by Mindes v. Seaman 453 F. 2d. 197 (5th Cir. 1971), the District Court may dismiss this case in order for the Plaintiff to exhaust his remedies before the Army Board for the Corrections of Military Records?

PARTIES

Respondent adopts the Petitioner's statement with respect to the parties.

STATEMENT

The Respondent, David Stinson, adds the following to the Statement contained in the Petitioner's Petition for Writ of Certiorari.

On April 30, 1986, General Hornsby filed a motion to dismiss Stinson's complaint asserting that Stinson had failed to exhaust his administrative remedies. Further, in their brief to the Eleventh Circuit Court of Appeals, the Petitioner argued that David Stinson had not exhausted his administrative remedies because he had not availed himself of the administrative remedies available before the Army Board for Corrections of Military Records, pursuant to 10 U.S.C., Section 1552(a).

REASONS FOR DENYING THE PETITION

This Court, in Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d. 586 (1983), held that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged Bivens type constitutional tort violations. This Court further stated:

> "This Court has never held, nor do we now hold, that military are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military services."

Chappell, 462 U.S. at 304, 103 S. Ct. at 2368.

In footnote 3 of its decision, this Court stated:

> "We leave it for the Court of Appeals to decide on remand whether the portion of respondents' suit seeking damages flowing from an alleged conspiracy among petitioner in violation of 42 U.S.C. Section 1985(3) can be maintained."
>
> supra at p. 305.

Implicit in this Court's order of remand, in Chappell v. Wallace, supra, is the recognition that, in some situations at least, uniformed members of the Armed Services may assert that their constitutional and statutory rights have been violated by their superiors. Gonzalez v. Department of Army 718 F. 2d. 926 (9th Cir. 1983).

Unlike Bivens type constitutional tort violations, actions pursuant to 47 U.S.C. Sections 1981 and 1983 were created by Congress. In passing Sections 1981 and 1983, Congress did not create an exception for state military departments.

In Gonzalez, supra, although the Court did not decide whether Chappell v. Wallace precluded Section 1981 and Section 1983 claims, the Court did apply with modifications a balancing approach expressed in Mindes v. Seaman, 452 F. 2d. 197 (5th Cir. 1971). The first part of the test is that an internal military decision is unreviewable unless the Plaintiff alleges a violation of the Constitution, a federal statute, or military regulation; and has exhausted his available intraservice remedies. Gonzalez at p. 929. The second part of the test involves the following four factors:

1. The nature and strength of the Plaintiff's claim.

2. The potential injury to the Plaintiff if review is refused.

3. The extent of interference with military functions.

4. The extent to which military discretion or expertise is involved.

Gonzalez, supra at p. 929, 930.

In the present case, General Hornsby filed a motion to dismiss Stinson's complaint asserting that Stinson failed to exhaust his administrative remedies. Further, in their brief to the Eleventh Circuit Court of Appeals, the Petitioners argued that David Stinson had not exhausted the administrative remedies available before the Army Board for Corrections of Military Records, pursuant to 10 U.S.C. Section 1552(a).

In Crawford v. Texas Army Nat. Guard, 794 F. 2d. 1034 (5th Cir. 1986), the Fifth Circuit was faced with a case similar in nature to the present case. In Crawford, although the Court affirmed a dismissal of a Section 1983 action based on Chappell, they modified the dismissal to be without prejudice to the reviewability of any future actions taken by the Army Board for the Corrections of Military Records, Crawford, supra at p. 1037.

Similarly in the present case, the Eleventh Circuit remanded Mr. Stinson's case back to the District Court, in order that it might be determined if Mr. Stinson had exhausted the administrative remedies before the Army Board for Corrections of Military Records, 821 F. 2d. at 1541. As a matter of fact, General Hornsby urged the Court to take this position because, in their brief, he argued that David Stinson had not exhausted his administrative remedies. (See pages 12 and 13 - Brief of Appellants).

Although the decisions of the Eleventh Circuit, in the present case, and the decision of the Fifth Circuit in Crawford

may be worded differently, the end results will be the same. The case will end up before the Army Board for Corrections of Military Records.

The present case is not an appropriate one for this Court to tackle the difficult issue as to whether an individual may maintain a Section 1981 and 1983 action against a state military department or its individual officers. Thus, the petition for writ of certiorari should be denied.

CONCLUSION

The issue of whether or not a member of a state National Guard may bring an action, pursuant to 42 U.S.C. Sections 1981 and 1983, against a state military department, or its officers, should not be decided in the present case, since it has not been shown that David Stinson can overcome the test described in Mindes v. Seaman, supra. Therefore, Respondent would contend that there is not an actual controversy before this Court and thus the Petition for Writ of Certiorari should be denied.

Submitted by

OF COUNSEL:

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and HAWTHORNE
516 S. Perry Street
P.O. Box 64
Montgomery, Alabama 36101
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Kenneth Shinbaum
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to the filing the foregoing or immediately thereafter, I caused to be delivered a true and correct copy of same, United States postage prepaid and correctly addressed to Don Siegelman, Attorney General of the State of Alabama, and Robert Rush, Assistant Attorney General of the State of Alabama.

Done this the 31st day of May, 1988.

Kenneth Shinbaum